

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 10-05(Revised)

October 9, 2009

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Skip Counsel Issue Regarding Service of Documents and
Correspondence

The Agency's policies regarding contacts with parties and witnesses represented by counsel have been formulated consistent with the ethical standards applicable to Agency attorneys as members of the bar, particularly the American Bar Association's Model Rule of Professional Conduct 4.2 (MR 4.2), the skip counsel rule. This rule prohibits contact with a person whom an attorney knows to be represented by an attorney in the case, without the prior consent of that attorney or authorization by law. **The Agency's skip counsel policies are equally applicable in both unfair labor practice and representation cases.** The skip counsel policies, which apply to all Board agents whether or not they are attorneys, determine whether it is appropriate to interview a former or current supervisor or agent ex parte. See Section 10058 of the Unfair Labor Practice Casehandling Manual.

The skip counsel rule also applies to all forms of written communications, ranging from informal email to the service of all documents and correspondence. Further, the skip counsel rule applies regardless of the method of service, and is therefore applicable to documents that are served electronically.

The skip counsel rule prohibits ex parte contacts with a represented person about the subject matter of the representation absent either consent from adverse counsel or legal authorization to engage in the contacts. Section 11842.3 of the Unfair Labor Practice Casehandling Manual, entitled "Service on Attorney or Other Representative," is intended to ensure that Board agents' service of documents and related correspondence complies with the skip counsel rule's requirements.

Section 11842.3 states, in pertinent part, that when a party or person is represented by an attorney, all documents and correspondence must be addressed to and served exclusively on the attorney unless the attorney has consented to direct contacts with the party or person or has authorized direct service upon the party or person, or unless one of the exceptions applies. The exceptions listed in the Manual (Section 11842.3 (a),(b), and (c)) are documents

for which there is legal authorization permitting service on the party or person, as well as on the attorney.

Among the documents included in the exceptions (and thus do not require exclusive service on the attorney) are charges, petitions, election notices, final orders and decisions, subpoenas, and standard cover letters. (See the Manual for a complete listing). However, the Manual specifies that if a written communication conveys substantive information or invites a response, then that communication must be addressed to and served exclusively on the attorney, unless the attorney has consented to service on the party or person. The distinction that the Manual draws between boilerplate and substantive cover letters reflects the skip counsel rule's prohibition on communicating directly with a represented person about the subject matter of the case.

Documents that are not covered by the authorized by law exception should be served exclusively on the attorney unless the attorney has consented to ex parte contacts with the witness. Such documents would include Notices for posting pursuant to a settlement agreement, an ALJ decision, or a Board Order, which, as set forth in footnote 5 of Sec. 11842.3 in the Manual, may only be sent directly to a party if the attorney has consented to direct service. Similarly, post-complaint litigation documents such as motions, briefs, and exceptions should be sent only to the attorney unless the attorney has consented to service on the party or person.

Absent consent or authorization permitting direct contacts, even sending a courtesy copy of a document to a party or person represented by an attorney is impermissible under the skip counsel rule.

Please note, however that when the designated representative of a party or person is not an attorney, the skip counsel rule does not apply. The Agency's policies regarding service of documents and correspondence when the representative is a non-attorney is set forth in Sec. 11842 of the Manual.

Any questions concerning this matter should be addressed to Special Ethics Counsel Lori Ketcham, your Assistant General Counsel or Deputy.

/s/
R. A. S.

cc: NLRBU
Release to the Public

